



# The Constitution Outside the Courts: A Preliminary Inquiry

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*Spring 1992*

# The Constitution Outside the Courts: A Preliminary Inquiry

Mark V. Tushnet

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## Seegers Lecture

### THE CONSTITUTION OUTSIDE THE COURTS: A PRELIMINARY INQUIRY

MARK V. TUSHNET\*

Constitutional law is obsessed with the Supreme Court and with the “countermajoritarian difficulty” of judicial review. Scholars note in passing that the Constitution requires federal and state legislators and executive officials to take an oath “to support this Constitution,”<sup>1</sup> but there has been little systematic attention to the implications of the obligation thereby imposed on non-judicial officials. Most of the scholarship on the question deals with the issue of whether legislators and executive officials may take constitutional considerations into account when they make their decisions.<sup>2</sup> In this form the issue is largely uninteresting. However, the issue gains some interest when officials, after taking constitutional considerations into account, end up disagreeing with what the courts have said on the same question, or what the officials believe the

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\* A different version of this article was delivered as the Seegers Lecture in April 1991. I thank Dean Edward McGlynn Gaffney for inviting me to deliver the lecture, the faculty at Valparaiso University School of Law for helpful comments on it, and participants in a faculty workshop at Georgetown University Law Center for their comments.

1. U.S. CONST., art. VI, para. 3.

2. Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); Paul Brest, *Congress as Constitutional Decisionmaker and Its Powers to Counter Judicial Doctrine*, 21 GA. L. REV. 57 (1986). Sanford Levinson has explored some implications of the oath required by statute (not by the Constitution) for naturalization, SANFORD LEVINSON, CONSTITUTIONAL FAITH 103-06 (1988) [hereinafter LEVINSON]. Occasional references to the issue crop up in discussions of the amendment process, see, e.g., Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L. J. 453 (1989); Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

courts would say were they to face the question.<sup>3</sup> There is, I believe, a much richer terrain to explore.

Of course non-judicial officials must follow the Constitution, but to say that is to say little. The interesting question is, *how* should non-judicial officials go about following the Constitution? Lawyers whose primary focus is judicial review almost naturally say that non-judicial officials should do what judges do when they face constitutional questions. This response has two components. First, legislators and executive officials should put aside ordinary political concerns when they address constitutional questions, and should instead devote their efforts to developing a principled understanding of the constitutional provisions that bear on the problem at hand. Second, where the courts have already developed a framework for dealing with the problem, legislators and executive officials should address it in the terms -- presumptively principled -- that the courts have made available to them. A stronger version of this component is that legislators commit what Stephen Carter has usefully called a "constitutional impropriety" if they reach a conclusion different from the one they honestly believe the courts would reach or, indeed, will reach when litigation brings the question to the courts.<sup>4</sup>

I believe that an alternative description of how legislators and executive officials ought to behave better fits the constitutional scheme. As a preliminary I distinguish among three ways of deciding: by reference to principles, by reference to policy, and by reference to politics. The distinction I draw between principles and policy roughly tracks Ronald Dworkin's similar distinction: Decisions based on policy are predicated on consideration of what would be best for the society overall, while decisions based on principle are based on considerations of individual rights.<sup>5</sup> A legislator makes a political decision, in

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3. Perhaps the most notable recent controversy on this was provoked by the argument made by former Attorney-General Edwin Meese that because the Constitution, not the decisions of the Supreme Court, was the supreme law of the land, non-judicial officials were entitled to follow their views of the Constitution notwithstanding contrary judicial views. See Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987). See also Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989-90) [hereinafter Easterbrook]. My views on this question are expressed in Mark Tushnet, *The Supreme Court, the Supreme Law of the Land, and Attorney General Meese: A Comment*, 61 TUL. L. REV. 1017 (1987).

4. Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357 (1990). Carter uses the term "constitutional impropriety" in a slightly different way from mine, and I do not mean to suggest that his use has the implications that I draw from my use of the term.

5. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22 (1977). Dworkin's distinction has been widely criticized, and it may be that in the end the distinction cannot be sustained. Indeed, I will argue that the courts have not honored the distinction drawn by Dworkin in wide ranges of their constitutional decision-making. See *infra* text accompanying notes 16-17. Yet, for purposes of rough exposition the distinction does capture differences in orientation that it seems worthwhile to

contrast, when she casts a vote because she believes that it will enhance her prospects for re-election, for election to higher office, or for achieving some other goal that is a source of personal satisfaction to her.<sup>6</sup>

My general argument is that, across a wide range of constitutional issues presented to legislators and executive officials, there is nothing constitutionally improper with making a political decision. Indeed, with respect to an important subset of constitutional questions -- roughly, those dealing with the separation of powers within the national government and between the national and the state governments -- legislators *ought to* make political decisions; the constitutional scheme rests on the assumption that that is how they will behave, and if they deviate from that prescription the chances are that the outcome will itself be constitutionally improper. I will also argue more specifically that there are good reasons for legislators to be wary of structuring their deliberations in the terms set by the doctrines elaborated by the courts. In part that is because the courts' doctrines may respond to concerns going to the ability of the courts themselves to implement one rather than an alternative doctrinal approach. But, in part legislators ought to consider abjuring the courts' terms because the polity will lose an important source of insight into the constitutional scheme if they do -- or, to put it positively, legislators may make a distinctive contribution to the development of a society regulated by the Constitution if they think about constitutional issues in terms different from the terms the courts use.

## I. THE CONSTITUTION OUTSIDE THE COURTS: A SURVEY OF PROBLEMS

I begin by providing a survey of the situations in which the Constitution is somehow discussed outside the courts in ways deserving detailed analysis. Obviously, constitutional questions arise outside the courts when someone objects to a legislative proposal on the ground that, if enacted, the proposal would be unconstitutional. The proposal would, it might be said, violate the Establishment Clause of the First Amendment, or the proposal might violate the principles of separation of powers. The most interesting questions here arise when the proponent says, "I know that the courts will, or are extremely likely to, find my proposal unconstitutional, but we ought to adopt it anyway." An interesting variant on this problem occurs when the proponent of legislation says that, not only is it sound as a matter of public policy (and advantageous as a matter of politics, of course), but that it is compelled by the Constitution. The proponent might say, "If we don't act, the courts will force us to, and we may be less happy about acting under the gun, and within a framework established

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note.

6. I will argue that this notion of political decision-making is more complicated than might initially appear, because some legislators may enhance their electoral prospects by behaving in a principled way -- that is, they may advance their political careers by standing above politics.

for us by the courts, than if we take the initiative." Or, more interestingly, the proponent might say, "[a]dmittedly, the courts have not yet said that the Constitution requires us to enact a program like this, and indeed they are unlikely to say that in the near future. Even so, the program is not only consistent with the Constitution -- everything we do has to be *that* -- it actually implements the values that the Constitution expresses."<sup>7</sup>

Former Attorney General Edwin Meese brought a related aspect of the Constitution outside the courts to public attention. What, Meese asked, should a public official do in response to a judicial interpretation of the Constitution that she believes is deeply wrong? In particular, under what circumstances may such an official simply disregard what the courts have said, because the courts, as the official sees it, have misinterpreted the Constitution? Merely by asking these questions, Meese attracted many hostile responses, though it must be said that one reason for the adverse reaction surely was that Meese's critics disagreed as much with the counter-interpretations of the Constitution that Meese offered as with the fact that he rejected some of the Supreme Court's interpretations.<sup>8</sup>

A third example of constitutional interpretation outside the courts is the political questions doctrine and related aspects of the Constitution. Properly understood, the political questions doctrine identifies provisions in the Constitution whose interpretation is left to the political branches. Consider *United States v. Richardson*<sup>9</sup> as an example. The plaintiff there argued that Congress' failure to make public the budget of the Central Intelligence Agency, a failure that persisted for nearly thirty years by the time the litigation was concluded, violated the constitutional requirement that "a Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."<sup>10</sup> The Court found that the plaintiff lacked standing to raise this claim, but it used language strongly hinting of "political questions" concerns. Had the Court explicitly said that the question of whether Congress's actions were consistent with the "statement and account" clause was a political question, the Court would have said that the Constitution left it up to Congress to decide what practices were consistent with the requirement that a statement of

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7. See, e.g., Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L. J. 1 (1987), both dealing with an asserted constitutional right to material well-being at some minimum level (a "right to welfare"), not yet acknowledged by the courts. Both Black and Edelman suggest that the courts ought to acknowledge such a right; the issue I am addressing arises even if, and perhaps especially if, they do not and (perhaps) ought not.

8. See Symposium, *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 TUL. L. REV. 977 (1987).

9. 418 U.S. 166 (1974).

10. U.S. CONST., art. I, § 9, cl. 7.

expenditures be published "from time to time."

The political questions doctrine is a judicially developed doctrine of constitutional law, which has been articulated, of course, in litigated cases. There are, however, areas closely related to those covered by the political questions doctrine, as to which essentially the same questions arise even though no litigation has occurred to occasion judicial comment. Consider, for example, the issue that arises recurrently over the proper range of considerations Senators may take into account when deciding whether or not to approve a nomination of a judge, and the related issue of the proper scope of senatorial questioning of a nominee. These issues are constitutional because they implicate the relations among the three branches. And, the traditional materials of constitutional exegesis -- text, *The Federalist Papers*, and the like -- can be used to analyze the constitutional questions.<sup>11</sup> Should they be? Or, may a Senator's decision on what questions to ask, and what considerations to take into account, be predicated solely on political concerns?

A fourth example of "the Constitution outside the courts" is provided by the process of constitutional amendment. There is the fundamental question of whether some amendments of the Constitution would be so inconsistent with the values embedded in the document that they would be "unconstitutional." The possibilities range from the pointed, though absurd -- could the Constitution be amended to make California a hereditary monarchy (on the theory that the republican form of government clause stands as an obstacle to the full use of the states as laboratories of social experimentation)? -- to the dramatic -- could the Constitution be amended to eliminate the first amendment (or to make it clear that the states were not bound by the restrictions imposed on the national government by the first eight amendments)?<sup>12</sup>

The rhetoric of the 1989-90 discussion of the proper response to the Supreme Court's flag-burning decisions suggests an interesting variant on this problem. When Congress considered a proposal to amend the Constitution to make it possible for governments to prohibit flag-burning, opponents of the proposal argued that it was unwise to amend the Bill of Rights for the first time in 200 years. Yet, the proposal might have been characterized as an attempt to return the First Amendment to its proper interpretation, one that the Supreme Court had mistakenly abandoned. Similarly, if conservatives suggested that the Constitution be amended to eliminate the constraints the Supreme Court has imposed on state governments through its interpretation of the Fourteenth Amendment as incorporating most of the Bill of Rights, a similar rhetoric would

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11. See, e.g., Bruce Fein, Commentary: *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989).

12. For a discussion of the question, see LEVINSON, *supra* note 2, at 126-51.

ensue even though proponents of the change might cogently argue that all they wanted to do was to get the proper interpretation of the Constitution *back* in force. The rhetoric of amending the Constitution reveals important facets of the public's understanding of the Constitution -- an understanding that, of course, is located outside the courts.<sup>13</sup>

A final topic related to "the Constitution outside the courts" involves identifying *when* the phenomenon of constitutional discussion outside the courts occurs. Bruce Ackerman has argued that there are "constitutional moments" when the public generally considers fundamental questions of the constitutional order, and that the courts should interpret the Constitution with an eye to those moments.<sup>14</sup> Constitutional discussions occur outside the courts more often than in Ackerman's constitutional moments. Consistent with my general theme, I suggest that questions about the proper scope and form of constitutional deliberation outside the courts arise with particular urgency in situations that political scientists called "divided government," a condition that we have been experiencing for the past generation. If that suggestion is correct, the last chapter of my argument must, as I hope it will eventually, address the political context of my discussion itself.

## II. CONGRESSIONAL DELIBERATIONS

What does the Constitution mean to a legislator who disagrees with a Supreme Court interpretation of the Constitution? The most interesting questions arise in such cases, or where the courts will probably never offer their interpretations of the Constitution. The controversy over the constitutional status of laws prohibiting flag-burning is a recent example in the first category, while the questions that arose during the Watergate affair over the meaning of "high crimes and misdemeanors" in the constitutional clauses dealing with impeachment is an example in the second. I believe, however, that we can get a better understanding of the underlying issues by starting with an apparently less difficult category.

### A. *Judicial Balancing and the Constitution Outside the Courts*

The substantive constitutional law regulating many areas calls for the courts

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13. Levinson's discussion of the public rhetoric of the Second Amendment provides another illustration, although the substance of that rhetoric does not, I think, shed much light on general questions about the Constitution outside the courts. Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L. J. 637 (1989).

14. Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L. J. 1013 (1984). See also James Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287 (1990).



to balance competing considerations in assessing the constitutionality of a challenged action.<sup>15</sup> In the terms I have introduced, those competing considerations implicate questions of principle and questions of policy.<sup>16</sup> Those who defend balancing as a technique of constitutional adjudication have been bedeviled by the obvious question of comparative institutional competence.

Their critics argue in several steps. First, they acknowledge that judges, because of their independence and training, have a comparative advantage in assessing principle, but they stress that the advantage is only comparative, not absolute -- a point that will play an important part in my later discussion. Second, they suggest that elected officials have a comparative advantage in assessing policy. In part, they argue, elected officials have that advantage because they have access to better means of informing themselves about the consequences of alternative policies (and, recall, "policy" means something that makes society better off overall). Even if judges can use innovative techniques of management to inform themselves about the implications of their policy decisions,<sup>17</sup> still, critics of balancing argue, many aspects of policy implicate such a wide range of interests that elections are a better technique of assessing those interests than any alternatives available even to the most imaginative court. Further, elected officials have a comparative advantage in assessing the intensity of public views, and intensity is relevant to arriving at an overall policy judgment. The critics of balancing conclude that the presence of policy considerations in the balancing process overcomes -- "outweighs," one might say -- the comparative advantage judges concededly have as to questions of principle. In short, the critics conclude, on balance, that there is no reason to believe that the judges' determination of the principle/policy balance will be better than the determination made by elected officials.

I am quite sympathetic to this criticism of balancing as a technique of constitutional adjudication, but it needs elaboration to illuminate the question of the Constitution outside the courts. The most obvious defect in the critics' argument is that it focuses on principle and policy and ignores politics. That is, the judges' comparative advantage might be re-established by stressing that, although the critics' analysis of principle and policy might be correct, it fails to acknowledge the role that politics plays in decisions by elected officials.

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15. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943 (1987).

16. To the extent that the structure of the balancing shows that on occasion some considerations of policy can outweigh considerations of principle, it demonstrates that my way of using those terms to describe the Court's actions is different from Dworkin's. For him, considerations of principle by definition "trump" -- or "outweigh," though the metaphor is inapt in Dworkin's scheme and he does not use it -- considerations of policy.

17. See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

Developing this argument leads me to identify a number of elements that I believe are essential to a full understanding of the Constitution outside the courts. First, it bears noting that the distinction between politics on the one hand and principle and policy on the other is not sharp. Most obviously, across a rather large domain an official's political interest corresponds to her policy interests. Deciding whether a statute will be better for the society overall calls in part for determining the statute's public impact. An official's political interest in election or re-election will lead her to be concerned about making that determination accurately with respect to her constituents. When a number of officials with different constituencies participate in determining public policy, the overall political interests may correspond quite closely to the overall policy interests.<sup>18</sup>

In addition, members of Congress can gain reputations, which they turn to electoral advantage, as "guardians of the public fisc" or as "people with a wider view." Sometimes they do so by using some aspects of their power, such as their seniority, to secure benefits for their constituents while refusing to engage in log-rolling that benefits other officials. Sometimes they do so by taking the wider view even with respect to benefits narrowly targeted on their constituency.

The general point is that some elected officials can sometimes enhance their political prospects by taking positions of principle.<sup>19</sup> Consider, for example,

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18. I should note an arguable exception to this point, typically illustrated by log-rolling, pork-barrel legislation. In these situations, the interests of the multiple participants lead them to satisfy each other through reciprocal deals, each one of which is politically advantageous to each participant (at least in the short run), but which in the aggregate make the society worse off overall. These are analogues to the game theorists' Prisoners' Dilemma game.

I am unsure of the implications of this point for the general analysis. First, the core examples tend to involve what the Court has come to call "social and economic legislation," as to which it provides little oversight. That might mean that, although the performance of elected officials is not very good, the constitutional system as a whole does not constrain them. Yet, if the argument is correct, it would provide a basis for revising contemporary doctrine in these areas. Alternatively, the argument might mean that there are no considerations of principle that the courts could sensibly invoke, either because of limitations on their institutional capacity or because of some broader moral skepticism about problems in the relevant domain.

Second, I have suggested that elected officials may gain political advantage in the short run from this sort of legislation, thereby hinting that they may not get such advantage in the longer run. Here too the analogue to the Prisoners' Dilemma may hold. Game theorists have shown that participants in Prisoners' Dilemmas games rationally should reach the socially desirable outcome if they are engaged in a series of games and do not know when the series will end. Some elected officials have a longer time-horizon than the next election, and to that extent they may factor long-term considerations — that log-rolling leads to inflation, for example — into their political calculations.

19. Controversy exists in the relationship between liberal political theory and the attitudes of citizens in public discussions. It is controversial whether a person can offer as reasons arguments that are not personally motivating and yet remain consistent with liberal political theory. I deal with

the failure of a proposed constitutional amendment dealing with flag-burning. I believe that one important reason for its failure was that some members of Congress came to believe that their political position with their constituents would be enhanced if they "stood up for the Constitution" by opposing an amendment to "change the First Amendment."<sup>20</sup> What then becomes interesting is the distribution of members' decisions between "principled political" action and "purely political" action. If principle in the legislature is only a partial substitute for principle in courts, perhaps we ought to hope that legislators would act in a principled political way when their actions were unlikely to be reviewed by the courts, and could be less concerned about purely political actions when their actions were likely to be reviewed.

Some other aspects of the argument I have been making should be made explicit. I have been attempting to weaken the claims made on behalf of judicial balancing to the extent that those claims rest on the proposition that, whatever else might be said, decisions by elected officials are more significantly influenced by politics than by policy and principle. So far I have been arguing that politics sometimes encompasses policy and principle. Even so, the defender of judicial balancing should respond, the underlying question is comparative: Are elected officials *more* influenced by politics (independent of policy and principle) than are judges? The answer to that question must of course be "Yes," but the answer may not be as significant as might initially be thought.

The case for judicial balancing would be strong if three conditions were met. First, the overall balance should take into account *only* considerations of principle and policy, and should not be contaminated to the slightest degree by political considerations. Second, even if some elected officials sometimes fold policy and principle into their political calculations, sometimes they do not, thereby contaminating the outcome of their deliberations. Third, judges never contaminate their decisions by injecting political considerations into their balancing of policy and principle.

I doubt that anyone in a post-legal realist world believes that the third condition is satisfied, and I certainly do not. Yet, if it is not, the argument for judicial balancing has to be reconstructed. The obvious modification of the third

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this controversy in Mark Tushnet, "The Limits of Involvement of Religion in the Body Politic", in *THE ROLE OF RELIGION IN THE MAKING OF PUBLIC POLICY* (James F. Wood, Jr. & Derek Davis eds., 1991).

20. I do not mean to suggest that everyone who opposed the amendment made that political calculation. Others may have concluded that they would lose votes in the next election because of their position, though not enough votes to mean that they would lose their seats. Some Congress members may have concluded that defending the Constitution, as they saw it, was worthwhile even if the end result was the loss of their positions.

condition is that judges contaminate their decisions less frequently than elected officials do. That is, although judges sometimes either think about or are unconsciously influenced by political considerations (defined in the broad sense I offered at the outset, and not confined to concern for re-election), they do so less often than elected officials do. That has to be true. Yet, modifying the third condition requires that the first be modified as well. The defense of judicial balancing would then turn on the propositions that some contamination by politics is acceptable, too much contamination is undesirable, the contamination that occurs in the courts is acceptable, and the contamination that occurs in legislatures is not.

These propositions could generate two models of the policy-making process. In one, the courts would balance because the legislative outcome was "inappropriately" influenced by politics. Here the notion of "inappropriateness" has some substantive content. Precisely because we are examining a balancing model, though, I believe that we cannot invoke substantive notions as a constraint on legislative outcomes; those notions are, in Dworkin's sense, purely principled, and no balancing would be justified. The alternative is a threshold model. Courts could balance whenever the policy-making process was affected by a degree of politics exceeding some floor.<sup>21</sup> Courts could balance, that is, when "too much" politics came into play.

The difficulty for judicial balancing's defenders now should be obvious. If elected officials sometimes really do take policy and principle into account, figuring out where to set the threshold of excessive political influence is likely to be exceedingly difficult. That concern should be heightened by noting that, in a post-legal realist world, judges influenced to some degree by politics would themselves be deciding where the threshold was.

I am not trying to develop a complete defense or criticism of judicial balancing. The analysis of balancing I have offered does, however, have some implications for an analysis of the Constitution outside the courts. In areas where the courts will apply a doctrine of balancing, elected officials can behave pretty much as they otherwise would: They can worry about politics, policy, and principle without framing their concerns in constitutional terms, because courts ought to balance the competing considerations in pretty much the same way, and the differences between courts and elected officials are not great enough to warrant substantial changes in how the elected officials behave.

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21. I note the possibility of a further elaboration in which judicial balancing would be appropriate where the policy-making process was *not* affected by a degree of concern for policy and principle that exceeded some floor. I doubt that we would get much more from that elaboration than I extract from the less elaborate version.

The threshold model of the domain in which judicial balancing is appropriate has another implication. To draw it out I must distinguish between multi-member decision-makers and single-member decision-makers. The model for the former, of course, is the legislature itself. The model for the latter is *not*, however, a governor or a President but is, instead, the police officer on the beat, making a decision to arrest or search without a warrant.<sup>22</sup> I treat executive officials as multi-member bodies because this analysis deals with the real role of politics in constitutional deliberations outside the courts, and it must therefore take a realistic view of how decision-makers operate. Certainly at the national level, the "President's" participation in constitutional discussions is influenced by numerous subordinate agents, at least some of whom have the kinds of partial commitments to principle that I have said some legislators do.<sup>23</sup>

The reason for drawing this distinction is that, in a threshold model involving a multi-member decision-maker, one participant can ask herself, "Suppose I rely solely on politics in making this decision; will that push the decision taken by the body as a whole over the threshold that the courts have defined?" If the answer is that it will not, I am hard-pressed to describe that decision-maker's behavior as undermining the promotion of constitutional values outside the court. Obviously, the point does not hold with respect to single-member decision-makers, who do directly undermine constitutional values if they, being the only ones in the premises, disregard principle. And, even when dealing with a member of a multi-member body, the analysis must assume -- as I believe it is realistic to assume -- that the member who asks the question about how other members are likely to behave is not a Kantian who takes as a maxim, "Act in a way that your action could be taken by everyone," and that the other members will not treat her decision as a defection in a Prisoners' Dilemma game that justifies abandoning their previous commitments to decisions based on principle and policy.

The argument thus far can be summarized: Where the Constitution inside the courts involves a balancing of interests, the Constitution outside the courts consists of elected officials acting as they otherwise would. I turn next to a brief exploration of a part of the terrain that others have explored, where Congress "rejects" a constitutional decision by the Supreme Court by enforcing a right that the Court refused to enforce. Most of what has gone before illuminates this problem, but it is less interesting than other dimensions of the issue of the Constitution outside the courts.

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22. The Court acknowledged the "policy-making" role of police officers in *Foley v. Connellie*, 435 U.S. 291 (1978).

23. For a discussion, see Easterbrook, *supra* note 3.

*B. Congressional "Overruling"*

As indicated earlier, most commentators who discuss the propriety of congressional rejection of judicial interpretations of the Constitution have a standard set of examples. These examples all involve litigation in which the Court was invited to hold that the Constitution protected a specified right, the Court rejected the invitation, and Congress thereupon enacted a statute protecting the right. Most of the examples, though, raise few interesting analytic issues, because they typically involve a legislative decision to protect an interest that is well within the *legislature's* authority to protect.

Consider, for example, *Lyng v. International Union, United Automobile Workers*.<sup>24</sup> Congress passed a law excluding families of striking workers from participating in the food stamp program. The union challenged the statute on the ground, among others, that it unconstitutionally impaired their rights of free expression. The Court disagreed. Suppose that Congress now decides to repeal the "striker" exclusion because, on fuller consideration, it concludes that the exclusion does indeed impair free expression rights. Congress' disagreement with the Supreme Court is largely uninteresting here, because Congress certainly has the legislative authority to protect interests associated with free expression, like the strikers', even if the interests are not themselves protected by the Constitution.

The issue becomes somewhat more interesting in two situations. First, suppose members of Congress say, "We would not include strikers in the food stamp program if it were up to us to make a pure policy choice. But, despite what the Supreme Court has said, we have become convinced that excluding them from the program actually does violate their constitutional rights." Here the members of Congress are relying on a principled interpretation of the Constitution, different from the Court's, to override their policy-based concerns. I confess, however, that I cannot find anything at all troubling in this sort of rhetoric.<sup>25</sup>

Second, occasionally questions might arise about whether an interest does fall within a legislature's general legislative competence.<sup>26</sup> For example, the Supreme Court held that neither the Fourth nor the First Amendments required state police officers to rely on subpoenas rather than search warrants to obtain

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24. 485 U.S. 360 (1988).

25. It is linked to the point noted above, *supra* note 23, regarding legislative creation of rights to public assistance.

26. State legislatures are, as a matter of federal constitutional law, bodies with general legislative authority; therefore the problem I discuss here can arise only in connection with congressional action.

evidence from newspapers.<sup>27</sup> Congress responded to the decision by barring newsroom searches except under limited circumstances; the effect was to prohibit searches that the Supreme Court said were constitutionally permissible.<sup>28</sup>

Applied to federal officers, the statute is just like the hypothesized "striker" statute -- Congress exercised its authority to regulate the activities of its own employees to promote an interest in privacy that, though not protected by the Constitution, was within its authority to protect. Applied to state police officers, though, the statute may be more problematic. What is the source of Congress' authority to enact a statute regulating *their* behavior? The lawyer's immediate response is, "Section 5 of the Fourteenth Amendment." Section 5 gives Congress the power to enforce the Due Process and Equal Protection Clauses of that Amendment. The difficulty, of course, is that the Supreme Court has already held that the interest in being free of newsroom searches is *not* covered by the Due Process Clause of the Fourteenth Amendment. The sense in which Congress' action amounts to "enforcing" the Due Process Clause, then, is obscure.

The Court furnished its answer in *Katzenbach v. Morgan*,<sup>29</sup> as implicitly elaborated in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>30</sup> The sequence of events in *Morgan* was the same as in the newsroom search situation: a decision by the Supreme Court refusing to hold a state law unconstitutional, followed by a federal statute making it unlawful to enforce the state law. The Court upheld Congress' action on a variety of theories. One was that Congress might be understood to be enforcing a constitutional right other than the one at issue in the Court's initial decision. So, for example, the Court in the newsroom case might have held that the rights of the newspaper itself were not violated by a search, but Congress might have determined that the rights of the newspaper's readers were violated.

A second, more important theory was that the only objection to the statute was that it lay outside any of the powers granted to Congress. This is an objection that sounds in federalism: state legislatures have general authority, but Congress has only the powers granted to it in the Constitution, precisely in order to preserve a domain of state autonomy. *Garcia* holds, however, that federalism-based restrictions on congressional power will not be enforced by the courts; rather, the states' interests in autonomy are to be protected by the

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27. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

28. Privacy Protection Act of 1980, 42 U.S.C. §2000aa (1988).

29. 384 U.S. 641 (1966).

30. 469 U.S. 528 (1985).

national political process.<sup>31</sup>

In short, when Congress extends "rights" that the Court has refused to recognize, no analytic conundrums arise. Either Congress is exercising its authority to protect interests as a matter of policy, or it is exercising a power that the Court itself has said is not subject to judicial supervision. When courts will not supervise legislative decisions, though, a new set of problems arises.

### *C. Situations of No Judicial Review*

On the face of it, it would seem obvious that we should be more concerned about officials' failure to think in constitutional terms where their actions will not be reviewed by the courts. Whatever else might be said about judicial balancing, for example, it does at least provide an opportunity for the injection of principled concerns into a process that might have undervalued them. If the courts are not going to backstop the officials, though, constitutional values might simply be ignored throughout the policy-making process. These are situations, we can say, in which the meaning of the Constitution is determined solely and completely by the actions of the political branches. One might think, therefore, that an analysis of the Constitution outside the courts has to conclude that in situations where the courts will not review the actions elected officials take, those officials ought to incorporate constitutional concerns into their deliberations more than they otherwise would. Unless they do, we will end up with a Constitution whose meaning is determined without reference to the Constitution.

I believe that such a conclusion is at least quite overstated and that, in a rather large range of situations where elected officials can anticipate no judicial review of their actions, those officials need not alter their behavior to assure "better" protection of constitutional values. Before explaining why, I have to re-emphasize two points, because they tend to be overlooked in the course of discussions of the Constitution outside the courts. First, nothing in the argument that follows *requires* that elected officials ignore the principles they might derive from the Constitution in their deliberations. Although I will note some points at which it might be a good thing were those officials to ignore those principles in some sense, the basic argument is only that elected officials *need not* pay attention to them. Second, some elected officials, whether for reasons of principle or politics, will in fact pay attention to constitutional principles anyway. The argument, in this aspect, is only that neither they nor their less "sensitive" colleagues have to change what they would otherwise do out of

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31. Even if *Garcia* is overruled, it seems unlikely that statutes like the Privacy Protection Act, which supplant substantive decisions made by state legislatures but do not alter the states' decision-making processes, would be impaired.



concern for the Constitution outside the courts.

The argument takes its starting point from the observation that in a system in which *Marbury v. Madison* plays a central role, situations in which the courts will not review the actions of elected officials do not just happen. Rather, the courts *decide* to refrain from review. The argument that follows is an elaboration of the following: Courts refrain from reviewing certain decisions because they believe that constitutional values cannot be better protected than through the operation of the ordinary political system.

I need to distinguish two kinds of reasons for refraining from review. I call these "court-centered" and "legislature-centered" reasons.<sup>32</sup> The most convenient example for my purposes is *Garcia*. In holding that it would not invalidate national legislation because the legislation assertedly violated constitutional norms of federal-state relations, the Court divided its analysis into two parts. First, Justice Blackmun argued, the Court's attempt to specify a test to determine when legislation was unconstitutional on those grounds had failed. The Court had focused on whether the legislation attempted to regulate traditional governmental activities but, Justice Blackmun said, it had proven impossible to identify such activities in any coherent way and to justify why the activities so identified ought to be free of federal regulation. This is what I call a "court-centered" reason.

Second, he argued, members of Congress have electoral incentives to respond to concerns that what they propose to do would disrupt federal-state relations in a way that contravenes the norms embedded in the Constitution as a whole -- the norms, that is, dealing with the powers of the states *and* with the powers of the national government. This is what I call a "legislature-centered" reason for refraining from judicial review.

There are other contexts in which these types of reasons appear. One component of the political questions doctrine, for example, counsels the courts to refrain from acting when they cannot find "judicially manageable standards" to define the boundaries of constitutionally permissible actions -- a court-centered reason.<sup>33</sup> One version of traditional rational-basis review holds that the courts should be extremely generous in reviewing social and economic legislation because it is the product of ordinary legislative bargaining, in which legislators do -- and may, without committing a constitutional impropriety -- respond simply to the electoral pressures they face -- a legislature-centered

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32. A more precise formulation of the latter would be "elected-official-centered reasons," but that is obviously too awkward, and the examples I develop involve legislatures anyway.

33. See *Baker v. Carr*, 369 U.S. 186 (1962).

reason for restraint.<sup>34</sup>

Often the two types of reason act together, as in *Garcia*. For example, it is almost never true that the courts could not devise manageable standards. There is, after all, the ever-reliable fallback of a balancing test, as proposed, in different versions, by the dissenting opinions of Justices Powell and O'Connor in *Garcia*. I have suggested elsewhere that the political questions doctrine can be both explained and justified by considering, not only the court-centered reason I have mentioned, but also the degree to which we can reasonably expect electoral incentives to operate so that what comes out of the political branches is no more likely to threaten constitutional norms than would occur if the courts were authorized to review their decisions.<sup>35</sup>

Consider now a legislator who is contemplating a proposal where she knows that judicial review is not going to occur because of either court-centered or legislature centered reasons. At first glance, it would seem obvious that to the extent that courts will refrain from review for legislature-centered reasons, the legislator may properly respond solely to political considerations. After all, the courts have structured their doctrine precisely with the understanding that legislators may so respond, and the courts have decided that, all things considered, the constitutional order will be best respected if they refrain from review.<sup>36</sup>

Before addressing a different level of difficulty, I will consider the situation where the courts refrain from review at least in part for court-centered reasons.

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34. See, e.g., *United States R.R. Bd. v. Fritz*, 449 U.S. 166 (1980). I refer in the text to traditional rational basis review to distinguish these cases from *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), which purports to apply rational basis review. *Cleburne* arguably confirms the long-heralded shift away from traditional rational basis review to rational basis with bite. See, e.g., Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). I doubt that it does, because the case implicated too many other concerns to take it as a general model for what the Court will do in more traditional areas. Similarly, I am skeptical, on both descriptive and normative grounds, of the contention by Cass Sunstein that the Court, across all areas of constitutional law, does and should ask for more than responsiveness to electoral incentives. See Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

35. HOWARD FINK & MARK TUSHNET, *FEDERAL JURISDICTION: POLICY AND PRACTICE* 238-39 (2d ed. 1987). Note the importance of the comparative judgment here. In the absence of a political questions doctrine, the courts would be authorized to intervene. Being imperfect, they will sometimes invalidate actions taken by the political branches that do not contravene constitutional values. These errors themselves are constitutional improprieties. The comparative question is whether more constitutional improprieties will occur if we rely solely on electoral incentives or if we allow judicial review.

36. Again I stress the necessary comparative judgments and the risk of judicial error mentioned in the preceding footnote.

Here the analysis is more complex. The formulation in the political questions doctrine seems to me to capture the general difficulty, so I use the terms of "judicially manageable standards" to frame my discussion. In saying that the lack of judicially manageable standards should lead the courts to refrain from acting, the Court is pointing to a particular incapacity of the courts, not to the absence of criteria that rationally bear on the decision at hand, a decision that will be taken, with finality, by the political branches under the political questions doctrine. The underlying idea is that the courts need to have doctrines stated in terms that provide reasonably clear guidance for courts in the future, including lower courts, whereas the political branches may operate in a more nuanced and less articulate way.

I am skeptical about the coherence of this claim about the different capacities of institutions, but I accept it for present purposes. Even taking the doctrine in its strongest form, it does not deny the existence of rational criteria for action. As Justice Frankfurter argued in his dissent in *Baker v. Carr*, the difficulty is rather that there are too many considerations that bear on the problem, not that there are none.<sup>37</sup> A slightly different way of putting the point, and one that is somewhat more useful for my purposes, is that it is relatively easy for the courts to identify at a rather abstract level the considerations relevant to the constitutional question presented to them and relatively hard for them to figure out what the bearing those considerations have in the circumstances presented.

In the terms I have been using, these considerations raise questions of policy and principle. If the reason the courts refrain from review is entirely court-centered, it would seem that legislators ought to consider only these questions of policy and principle. The courts stay away from the issue not because they believe that the impact of political concerns is acceptable but because they believe that the courts are not in a position to apply the considerations of policy and principle that are the only ones that properly ought to be invoked. At this point I must revert to a distinction I drew earlier between the action of an individual legislator and the action of the legislature as a whole. What should we say about a legislator in these situations if she cast her vote solely with regard to political concerns? Suppose that there are enough other legislators who act with an eye to principle and policy,<sup>38</sup> so that the product of the legislature as a whole crosses the threshold of principle and policy. The legislator's constituents can decide whether she has committed a constitutional impropriety. My own inclination is to say that she has not, but that she ought to recognize that she is running the risk that attends all non-cooperative behavior

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37. 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting).

38. Again I must note that sometimes the politically expedient thing to do is vote according to policy and principle.

in Prisoners' Dilemma situations.

Unfortunately, because it makes the argument even more complicated, there is yet another branch to explore. I have been proceeding on the implicit assumption that the courts correctly have decided not to review the actions of the political branches. But, of course, courts like legislatures make constitutional mistakes, and some of those mistakes may consist of decisions to refrain from review. For the dissenters, *Garcia* was such a case. To them, the Court misunderstood the actual situation in Congress in relying on a legislature-centered reason for refraining from review. The dissenters believed that in modern circumstances, members of Congress actually had few electoral incentives to respond to the constitutional concerns traditionally described by the word "federalism."

Consider a member of Congress who agrees with the dissenters in *Garcia*. That member ought, it seems clear, to rely on her understanding of principle and policy in casting a vote. There is no inconsistency between the Court's analysis and such an action. More generally, if the courts erroneously invoke legislature-centered reasons to refrain from review, legislators certainly may act on principle and policy rather than politics. In short, as a general matter,<sup>39</sup> there is nothing constitutionally improper with a legislator who acts on principle and policy.<sup>40</sup>

I have said repeatedly that legislators do not act improperly if they rely on principle in situations where the courts assume that they will, at least to some extent, rely on politics. Now I must introduce an important qualification. To do so I must distinguish between direct and indirect electoral incentives. Direct incentives, obviously, are those that are likely to affect the legislator's prospects for reelection. Indirect incentives are those that make the legislator care about reelection in the first place.

There may be others, but the indirect incentive on which I will focus is the power of the legislature itself. In the absence of corruption, few people, I suspect, would be interested in serving in a legislature that was merely a rubber-

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39. With a qualification to be noted shortly.

40. The situation described in the text has a dynamic element that deserves note, though I think that there is little I can say about it. The very announcement by the court that it has legislature-centered reasons for refraining from review may affect legislators. It may persuade some that it is all right for them to rely solely on politics. If the court's initial analysis was wrong, the course of public policy may spiral downward, as a process that was already too infected by politics becomes even more so. Or, more optimistically, the court's announcement may shake legislators up. Some might have been relying on the courts to bail them out when they acted out of political motives, believing in their hearts, though, that principle and policy ought to govern. Once they are told that no one will bail them out, they may begin to act on principle and policy.

stamp for decisions made elsewhere. They want to accomplish something<sup>41</sup> or they want to exercise power because exercising power makes them feel important. To make serving in the legislature worthwhile, then, the legislator has an electoral incentive to maintain the power of the legislature.

In the constitutional scheme, the most obvious threat to the power of the legislature comes from the Executive Branch. As Madison understood, each branch is "ambitious," seeking to extend the domain of its own authority. The solution Madison thought the Constitution embodied was to set ambition against ambition. Congress's attempts to expand its power would be met by action by a President who had an indirect political incentive in maintaining the power of the office, and presidential power-grabs would be countered by congressional resistance.

Now consider a case of conflict between the President and Congress which is unlikely to result in judicial review. The example might be an impeachment, in which the conflict might be over the definition of an impeachable offense. Or it might be a hearing on the proposed appointment of a new Justice of the Supreme Court, where the conflict might be over the proper scope of the Senate's inquiries into the nominee's views. Or, we might have in mind a more general theory like Jesse Choper's, in which the courts are supposed to refrain from reviewing questions of separation of powers because each branch has sufficient political resources at its command in the battle of ambition against ambition.<sup>42</sup>

Madison believed that the constitutional system would work well if participants in these inter-branch conflicts responded to the indirect electoral incentive of maintaining their branch's power. Frequently, indeed almost always, one of the weapons in the struggle is the "Constitution card." That is, a President defending a controversial nominee will claim that the proper subjects of inquiry by the Senate are the nominee's character, integrity, and professional qualifications. That claim will be backed up by citations to the debates at the constitutional convention, quotations from *The Federalist Papers*, and an interpretation of the course of conduct of Presidents and Senators over the past two hundred years. The Chair of the Senate Judiciary Committee will respond with a document saying that the Constitution properly interpreted allows the Senate a scope of inquiry into the nominee's views restricted solely by the good judgment of the Senate.

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41. In this way a legislator's concern for policy and principle might be considered an indirect electoral incentive: Legislators want to be elected and reelected at least in part because they want to affect the shape of public policy.

42. See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* (1980).

Though the metaphor now becomes labored, my initial impulse had been to say that the Constitution card should not be part of the deck in these controversies. If the President convinces a Senator that, as a matter of principle, the range of senatorial inquiry is narrow, the power of the Senate is weakened. Playing the Constitution card, that is, seemed inconsistent with the scheme of ambition countering ambition.

On reflection I have concluded otherwise, because political actors believe that playing the Constitution card affects the outcome of the political contest between President and Congress. "You should do *that* because it's what the Constitution requires" is not, for these purposes, a legal argument about what the Constitution requires. It is, rather, a political argument.

How does the Constitution card function in political discussions? It affects the indirect electoral incentives of the participants. When the Constitution card is played, the President is saying that the power of the Presidency should be increased relative to Congress's, or Congress is saying that its power should be increased relative to the President's. Constituents are asked to decide which side is correct, and depending on circumstances and the effectiveness of the rhetoric of the way in which the card is played, members of Congress will have greater or lesser incentives to defend the power of Congress.

My overall conclusion regarding situations where the courts will not review the actions of the political branches is that elected officials may properly rely on principle, policy, *or* politics in deciding what the Constitution means in these situations, with two modest and rather weak qualifications: It probably would be a good idea for elected officials to give rather more weight to politics than to principle in separation of powers disputes, and it probably would be a good idea for them to give somewhat more weight to principle than they otherwise would when they hear cogent arguments that the courts have made a mistake in refusing the opportunity to review their actions.

#### *D. Situations of Judicial Review*

The preceding discussion has been aimed at the assumption that elected officials ought to be especially sensitive to constitutional values when they take actions that the courts will not review, for if they are not, no one will be. Yet, I suspect that most people would also think that elected officials should be particularly attentive to the Constitution when judicial review of their actions is likely. The language of "flouting the Constitution" seems attractive when elected officials do something that they know the courts will find unconstitutional; it seems more rhetorical when they do something that the courts will not review. Further, the arguments about legislature-focused reasons for refraining from review have a flip side: If courts refrain from intervening

because they think that legislators have political incentives to act in a manner consistent with constitutional values, they often intervene because they mistrust the political incentives.<sup>43</sup> That lack of trust readily translates into the language of constitutional impropriety. The courts intervene because we know that enough legislators will not take constitutional values adequately into account, and it does not seem wrong to say that a legislator who fails to take those values into account acts improperly.

I believe the situation is much more complicated. Using Congress's response to *Texas v. Johnson*,<sup>44</sup> the Supreme Court's first flag-burning decision, as my primary example, I will argue that there are good reasons for substantially discounting the courts' interpretation of the Constitution when matters that the courts will eventually consider are before the legislature. These reasons, though, are mainly reasons grounded in principle and policy, not in politics (except to the extent, once again, that there are political reasons for taking principled stances).

Consider a legislator who believes -- whether for reasons of principle, policy, or politics -- that it would be a good thing to adopt a piece of legislation that she believes the Supreme Court would invalidate in the likely event of judicial review. Of course the legislator could embody her proposal in a constitutional amendment, but that route is cumbersome. Would the legislator commit a constitutional impropriety if she nonetheless worked for its adoption through ordinary legislation? The legislator might insist that the prediction of invalidation is less well-founded than might appear. This could take two forms: changed circumstances and distinguishable cases. In a post-legal realist world, it would seem obvious that a legislator who can identify a change in the composition of the Supreme Court relevant to the issue of the proposal's constitutionality does not act improperly in putting the proposal forward. Nor, I think, must it be overwhelmingly apparent that the Court as presently constituted would in fact uphold a statute that a prior Court would have invalidated. All a legislator needs, I believe, is a well-grounded belief that the present Court *might* uphold the statute. For example, the new member or members of the Court need not have expressed themselves clearly on the issue, if they have stated general views about the proper role of the courts that suggest their willingness to uphold statutes their predecessors would have struck down.

An interesting variant on this position has been proposed by Senator Daniel Moynihan in an article called, *What Do You Do When the Supreme Court is Wrong?*<sup>45</sup> Senator Moynihan suggests, in a rather qualified way, that the

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43. That is the main theme of JOHN ELY, *DEMOCRACY AND DISTRUST* (1980).

44. 491 U.S. 397 (1989).

45. 57 *THE PUBLIC INTEREST* 3 (1979).

legislature can adopt a statute identical to one struck down by the courts, using the legislation to signal the depth of its disagreement with the courts' results. Thereby, the legislature hopes to influence the development of the law, perhaps to lead the courts to repudiate their earlier decisions even if the membership of the Supreme Court has not changed.

Sometimes, though, the legislator could not sincerely believe that the outcome is in doubt. The decisions to which she objects, and those that rather clearly imply that her proposal is unconstitutional, are recent, and there have been no relevant changes in the composition of the Court. Further, she notes that some Justices have occasionally said that it is improper for a court to change outcomes merely because of changes in the court's composition, at least in "ordinary" circumstances of constitutional adjudication.<sup>46</sup> Whether this position is defensible or not, it may be held by the new members of the Court; even a relevant change in composition, then, might not provide ground for believing that the outcome would change.

Under these circumstances, adopting the proposal would be almost, but not quite, pointless. Further, adopting it entails some obvious costs. Suppose, for example, that the statute calls for the criminal punishment of people who burn flags, after *Texas v. Johnson*, and that the legislator predicts, with a high degree of confidence, that the Court will strike down any conviction obtained under the statute. Even so, defendants will have undergone some cost, in time and personal strain (lessened, of course, by precisely the same confidence they ought to have that their convictions will not be sustained), before they prevail.

To what good end? So far there appear to be only two ends the legislator will have served. She will have expressed her disagreement with the courts in a very forceful way, and she may have gained some political advantage by standing up for the flag or by standing up against the Supreme Court. My personal inclination is to say that these gains are too modest, and that, under the analysis so far, the legislator has indeed committed a constitutional impropriety. But, I acknowledge that, though the gains might be modest, so too are the costs, given the assumption that the legislator and presumably everyone else confidently predicts that the Supreme Court will invalidate the statute. Perhaps the gains, though modest, are sufficient to justify the imposition of similarly modest costs.

Now imagine that the legislature repeatedly adopts, and the courts repeatedly strike down, statutes dealing with flag-burning. At some point

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46. For a discussion, see *South Carolina v. Gathers*, 490 U.S. 805, 823 (1989) (Scalia, J., dissenting).



observers will properly begin to describe the situation as a "constitutional crisis." Or, suppose that, after the Supreme Court issues an opinion saying that a post-*Johnson* flag-burning conviction must be vacated because the underlying statute is unconstitutional, executive officials simply disregard the opinion and continue to confine the defendant, even in the face of writs of habeas corpus. That surely looks like a constitutional crisis.

Not all constitutional crises are bad things, though. If one believes that the Supreme Court was wrong in a way that went to the core of a proper understanding of the constitutional order, perhaps one should want to provoke a constitutional crisis. If so, legislators who engage in repeated confrontations with the courts, and executive officials who ignore the Court's directives in adjudicated cases, may not be committing constitutional improprieties. To be sure, they are doing something very serious, which is likely to destabilize the political system with unforeseeable results. That counsels prudence in pursuing this course. I would suppose that elected officials should provoke constitutional crises only after they have thought seriously about the course they plan to take, and, perhaps more important for my overall argument, only if they believe that a crisis is the only way to remove an obstruction to accomplishing truly important ends of principle or policy. I doubt that politics alone is a sufficient justification for provoking a constitutional crisis, although I admit that this is little more than an intuitive feeling on my part.

Of course, I have been setting up the apparently more difficult line of analysis. Most of the time, those who disagree with the courts will offer proposals that they believe are distinguishable from the precedents. Surely there is no constitutional impropriety in doing so, even if the only reason for offering the proposal is to advance their proponents' prospects for re-election. Thus, it would seem important to distinguish between situations in which the proposals are *not* distinguishable from the precedents -- where the possibility of a constitutional impropriety seems substantial according to some aspects of the analysis I have offered -- and those in which the proposals are distinguishable--where there is no possibility of a constitutional impropriety.

I believe that, though legislators may perhaps want to be aware of the possibility of distinguishing a proposal from the precedents, they ought not concern themselves with that possibility in much detail. I think it helpful to frame this suggestion by talking about how legislators ought to discuss a legislative proposal once they are aware of the possibility that it is unconstitutional.

The natural suggestion, I think, is that they ought to discuss it in the terms the courts have established. If they conclude that, applying the doctrines the courts have developed, the proposal is distinguishable, they can go ahead

without fearing constitutional impropriety; they should not go ahead if they conclude that, applying the courts' doctrines, the proposal is not distinguishable. I want to challenge that suggestion.

I begin by repeating in this context two points made earlier. Some substantial part of the courts' doctrine consists of an assessment of policy considerations of the sort that are routinely part of legislative deliberation. To that extent, the ordinary discourse of legislators will track the courts' discourse. In addition, to some extent the courts' discourse is structured by the particular limitations of the courts as institutions, with the effect of generating what I have called "court-centered" reasons and similar doctrines.<sup>47</sup> Where the doctrines the courts develop depend importantly on such institution-specific concerns, it would be positively wrong for legislators to cast their deliberations in the terms the courts use.<sup>48</sup>

Reapportionment provides a useful example. The courts have imposed a rather rigid test of mathematical equality, which can be relaxed slightly only when a limited number of other considerations come into play. The primary reason for using such a test is clearly institution-specific: The courts understand that the range of considerations that ought, in democratic theory, to bear on the apportionment decision is so wide as to be impossible for the courts to administer; they can administer only a rule of mathematical rigidity. Now consider a legislator who disagrees with the courts' treatment of apportionment cases and who proposes some apportionment that, the legislator sincerely believes, is distinguishable from apportionments the courts have disapproved before. I see no reason why that legislator ought to worry about whether the proposed apportionment satisfies even a relaxed standard of mathematical equality except to the extent that the legislator believes, independently of what the courts have said, that mathematical equality is something that a sound apportionment would achieve.

I confess to some uncertainty about the range of institution-specific

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47. For a more general examination of this phenomenon, see Lawrence G. Sager, *Fair Measure: The Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

48. Perhaps the most effective examples of this phenomenon come from an area with which I am not concerned with here, where a legislator disagrees with a judicial finding that some practice is constitutionally permissible, and argues for legislation outlawing the practice on the ground that the practice is really unconstitutional despite what the courts have said. For example, in the Equal Protection context the courts have relied in part on institution-specific concerns to invalidate only badly motivated laws. See, e.g., *Washington v. Davis*, 426 U.S. 229 (1976); *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979). Yet, a legislator ought to be able to argue that laws with a disparate impact ought to be repealed because they violate the Constitution even if they are not badly motivated, at least to the extent that the courts' reasons for using the motivation test are institution-specific.

concerns that have structured constitutional doctrine. I am inclined to think that it is quite broad, that is, that a great deal of the constitutional law that the courts have articulated involves doctrines that respond in large measure not to underlying questions of constitutional values but to concerns about the capacity of the courts to administer alternative doctrines. If that suspicion is correct, legislators could debate proposals without substantial reference to what the courts have said even if judicial review of their product is likely.

Suppose, though, that we can identify a constitutional doctrine that is directly responsive to constitutional values and not substantially responsive to institution-specific concerns. For our purposes, I will use a distinction that played a prominent role in the post-*Johnson* debates, that between content-based and content-neutral regulation of expressive activity. *Johnson* suggested that the vice with the Texas statute invalidated there was that it was content-based, at least in the sense that liability was imposed on the basis of the likely response of an audience to the content of the message carried by the flag's destruction. When Congress considered its response to *Johnson*, Senator Joseph Biden attempted to write a statute that respected the distinction between content-based and content-neutral statutes. It was not, I think, an edifying experience, except by negative example.

There were two problems with Senator Biden's effort. First, it was not clear throughout the drafting process that he or other Senators really understood the distinction, and this not because they lacked legal sophistication themselves or through the advice they received from prominent legal scholars. Senator Biden took the position, understandable enough given the terms the Court has used, that a law was content-neutral if it applied to an activity that was defined without reference to content, that is, without reference to what the actor meant or to what the audience took the action to mean. On this view, it was the content of the action that mattered. Unfortunately for Senator Biden, the definition of content-neutrality was ultimately in the hands of the Supreme Court, and the Justices adopted an alternative, equally defensible understanding of content-neutrality. The Court held in *United States v. Eichman* that Senator Biden's statute was not content-neutral because the only sensible purpose offered in support of the statute implicated the content of the action of flag-burning;<sup>49</sup> that is, the only reason Congress sensibly could have for prohibiting flag-burning is to suppress the message that some burnings conveyed.

The lesson of the debates over content-neutrality and flag-burning, then, may be that even sincere efforts to cast legislative discussions in the terms set by the courts can be futile. That is particularly true where, as is the case by

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49. 110 S. Ct. 2404 (1990).

hypothesis, some legislators are motivated by their disagreement with what the courts have said. On the legislators' side, with the best will in the world, they still may find it difficult to take seriously a doctrinal framework that, in their view, so misled the courts. And, on the courts' side, again with the best will in the world, the judges still may be left with a nagging suspicion that the doctrinal terms the legislators used really were not what they cared about.

As, indeed, is true. That is the second problem that the debate over the response to *Johnson* illustrates. I doubt that anyone except perhaps Senator Biden himself really cared about whether Congress's response to *Johnson* was content-neutral or content-based. Those were the terms forced on members of Congress by the Supreme Court. Using those terms concealed what mattered to the legislators. If we believe that candor in constitutional discussions is desirable, I think we ought to refrain from developing norms that systematically lead legislators to talk about constitutional issues in terms that do not reveal their true concerns.

Finally, when legislators cast their discussions in the terms defined by the courts, we may lose their insights into the values that the courts have overridden.<sup>50</sup> As I have already suggested, this may be most apparent where the courts apply a balancing test, and the legislators may offer a different and enhanced view of the values that lost out in the judicial balance. But, I think the phenomenon occurs as well in cases of pure principle. The principles the courts articulate condense a set of social values even if the courts do not speak in terms of balancing.

In the flag-burning controversy, for example, the Supreme Court's opinions rather clearly did not fully capture the true depth of the feeling that something extraordinarily serious was at stake when flags were burned. Justice Brennan's opinion offered a verbal acknowledgement of those feelings, but it was too

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50. There is a subsidiary point here. Many legislators are not lawyers, and may find it difficult to engage in a sensible discussion on the terms the courts have set. For a plaintive quotation to this effect by Senator Mansfield, see Abner Mikva, *How Well Does Congress Support and Defend the Constitution*, 61 N.C. L. REV. 587, 602 (1983). Mikva also argues that many legislators have incentives not to examine the constitutional questions, *id.* at 609, and that, for a number of reasons, there are "questions concerning Congress' ability to make constitutional judgments." *Id.* at 590. Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985), responds that members of Congress have a somewhat better chance of doing an adequate job than Mikva claims, because of their ability to gather facts and, perhaps more important, because of recent changes in the staffing and organization of Congress. *Id.* at 728, 730. For my purposes, these discussions are somewhat off the point. I am concerned primarily with defending the proposition that non-judicial officials not only need not refer to judicial interpretations of the Constitution when they make their decisions but may indeed refer primarily to political considerations of a sort that would be entirely out of bounds if a judge referred to them explicitly.

abstract. Chief Justice Rehnquist's dissent in *Texas v. Johnson*, in contrast, was obviously passionate, but precisely because he had to quote poetry to make his point, his opinion somehow seemed inappropriate for the pages of the United States Reports.<sup>51</sup> But, in some ways more interesting, there was something else the Court's opinions could not adequately express and legislators could: the feeling of commitment to the principles of the Constitution. When members of the Supreme Court say they are doing something because the Constitution requires it, as Justice Kennedy did, there is a certain kind of self-interest at stake that weakens the force of the claim.<sup>52</sup> When members of Congress say that they should not amend the Constitution to deal with flag-burning because the values of free speech are too important to tinker with, there may be something a bit askew in their rhetoric,<sup>53</sup> but it seems to me clear that they contribute something distinctive to discussion of the meaning of the Constitution.

None of this suggests, of course, that legislators should never use the doctrinal terms the courts have developed. Legislators may be convinced, by independent reflection on the Constitution or by reading what the courts say, that the doctrines the courts use actually are responsive to the fundamental values of the Constitution. Any legislator who believes that the courts' doctrines accurately identify the relevant considerations of principle and policy should of course use those terms in discussing alternatives to the courts' decisions.

#### IV. CONCLUSION

Much of the preceding analysis consists of drawing distinctions and defining different categories of problems. I have tried to show that in many categories, elected officials can make their decisions in matters of constitutional concern by relying on political concerns. Where policy and, in particular, principle come into play outside the courts, they have a relatively small role. There is a residual category in which what the courts have said about the Constitution properly plays a substantial role in discussions of the Constitution outside the courts. But, I have tried to suggest, that residual category contains relatively few interesting cases.

In short, the courts have little to do with the Constitution outside the courts.

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51. See, e.g., Sheldon H. Nahmod, *The Sacred Flag and the First Amendment*, 66 IND. L.J. 511 (1991).

52. In Justice Kennedy's case, the statement is certainly a little odd because what was at stake was what the Constitution meant, and if Justice Kennedy believed that fundamental values were not infringed by statutes prohibiting flag-burning, his saying so would have meant that they were not (given the Court's 5-4 division).

53. Because proponents of an amendment could have claimed that they were not trying to tinker with principles of free speech but were simply trying to correct the Court's erroneous specification of those principles.

